Public Prosecutor v Rosman bin Abdul Wahab

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO MT1–42–3 OF 2003
LOW HOP BING J
22 SEPTEMBER 2006

Criminal Law — Penal Code s 165 — Public servant obtaining any valuable thing without consideration in connection with official functions — Elements of offence — Whether 'gratification' a necessary element — 'Consideration', definition of — Whether prima facie case made out

Criminal Procedure — Judgment — Grounds of judgment — 'Speaking' or reasoned judgment — Nature of

Criminal Procedure — Prosecution — Prosecution's case — Prima facie case — Whether maximum evaluation of prosecution's evidence required — Whether such evaluation of evidence requires a 'speaking or reasoned judgment'

Words and Phrases — 'Consideration' — Penal Code s 165 — Definition of

The accused was charged with seven amended charges under s 165 of the Penal Code. The charges stemmed from one initial advance payment and six other payments towards the purchase of a 'Volvo' motorcar for the accused by SP9. At the material time, the accused was attached to the PWD. SP9 had a contract with the PWD — a government agency — for the 'supply and delivery of metals' to one of its centres that the accused was in charge of. The accused allegedly requested the Volvo motorcar from SP9 to prevent 'interruptions' in the said contract. At the trial in the sessions' court, SP9 — as complainant — gave evidence, inter alia, establishing: (i) the request by the accused; (ii) the issuance of seven cheques for the said motorcar; and (iii) that the accused had not made any repayments to him in respect of any sum he expended towards the purchase of the said motorcar. However at the end of the case for the prosecution, the sessions' court acquitted and discharged the accused without calling for his defence. The trial judge was of the view that the evidence of SP9 was contradictory; and that the moneys advanced through the seven cheques were merely loans by SP9 to the accused. The trial judge was thus of the view that the prosecution had not established the accused had accepted a valuable thing without consideration. Although ten witnesses for the prosecution testified and the notes of proceedings and documentary exhibits ran up to 127 pages, the grounds of decision of the trial judge consisted mainly of a reproduction of the seven charges followed by three typewritten 'double-spaced' pages. The prosecution appealed contending, inter alia, that: (a) the trial judge failed to identify what the contradictions in SP9's evidence were; (b) the

trial judge erred in finding that SP9 had been intimidated and therefore his evidence was doubtful; (c) notwithstanding the trial judge's finding that the moneys were loans by SP9 to the accused, they were nevertheless valuable things without consideration for the purposes of s 165; and (d) the trial judge had erred in finding that there had to be established 'gratification'.

Held, allowing the prosecution's appeal:

(1) In order for the trial court to determine whether the prosecution has made out a prima facie case, the trial judge must subject the prosecution evidence to a maximum evaluation. This requires a trial judge to give a 'reasoned or speaking judgment'. In the instant case, upon a proper perusal of the trial court's grounds of decision, it was abundantly clear that the trial judge's general reference to contradictions in the complainant's evidence was not the result of subjecting the prosecution evidence to a maximum evaluation, nor was it supported by specific instances of such contradictions or the specific grounds on which such contradictions had been arrived at. Here, the grounds of decision had fallen short of a 'reasoned or speaking judgment' (see paras 11–12, 15).

(2) SP9's evidence had to be considered in its entirety and not in isolation. While there appeared to be discrepancy or contradiction pertaining to the so-called loan and/or the repayment thereof, the discrepancy or contradiction had been concisely clarified and explicitly explained under re-examination. The truth was that the payments as stated in the charges were not loans nor had the accused effected any repayment at all (see para 36).

(3) Had the trial judge subjected the prosecution's evidence to a maximum evaluation, there would have been no doubt that the discrepancy or contradiction, if any, would have been identified. None was stated in the grounds of decision. Hence, the trial judge had erred in arriving at the general conclusion that 'the complainant's evidence is always contradictory' (see para 39).

(4) After considering SP9's evidence in its entirety, the evidence and prevailing circumstances as evaluated did not support a finding of witness intimidation. However, even if there was such intimidation or compulsion, SP9 had given a satisfactory explanation for it in his evidence. The trial judge, having failed to subject the prosecution evidence to a maximum evaluation, had wrongly rejected the whole of SP9's evidence (see para 54).

(5) Gratification is not an essential ingredient under s 165 of the Penal Code. The trial judge's finding on the basis of 'gratification' instead of 'without consideration' in the instant case was thus an error in law. The word 'consideration' has not been defined in the Penal Code. Reference may thus be made to its ordinary, natural, popular meaning as found in a dictionary. In ordinary parlance, a consideration is something of value received by a promissor from a promise. It is anything given, promised or foreborne by one party in exchange for the promise or undertaking of another. In the instant

case, the payments were made by SP9 without any consideration from the accused, and was within the ambit of s 165 (see paras 58–60).

(6) In the instant case, SP9's evidence had been corroborated in material particulars by the evidence of other witnesses (SP3–SP7). Their evidence was capable of belief, independent and in respect of facts that lay at the axis of the dispute (see para 68).

(7) In the instant case, the prosecution evidence had established that the accused had accepted from SP9 valuable things by way of payment of the various sums reflected in the seven cheques. Hence, under s 42(3) of the Anti-Corruption Act 1997, the accused was presumed to have done so with such knowledge as to the circumstances set out in the charges, viz that the seven cheques had been accepted by the accused from SP9 who the accused knew had connection with his (the accused) official functions as a technical assistant, unless the contrary was proved by the accused. The trial judge had erred in finding that no prima facie case had been established by the prosecution and in acquitting the accused without calling for the defence (see para 69–70).

[Bahasa Malaysia summary

Tertuduh telah dituduh dengan tujuh pertuduhan pindaan di bawah s 165 Kanun Keseksaan. Pertuduhan-pertuduhan tersebut berpunca daripada satu bayaran pendahuluan dan enam pembayaran lain terhadap pembeli untuk sebuah kereta 'Volvo' untuk tertuduh oleh SP9. Pada masa matan, tertuduh bekerja dengan PWD. SP9 mempunyai kontrak dengan PWD — sebuah agensi kerajaan — untuk 'membekal dan menghantar besi' kepada salah sebuah pusatnya yang mana tertuduh dipertanggungjawabkan. Tertuduh dikatakan telah meminta kereta Volvo itu daripada SP9 untuk mengelakkan 'gangguan' dalam kontrak itu. Di perbicaraan di mahkamah sesyen, SP9 — sebagai pengadu — telah memberikan keterangan, antara lain, membuktikan: (i) permintaan oleh tertuduh; (ii) pengeluaran tujuh cek untuk kereta tersebut; dan (iii) bahawa tertuduh tidak membuat apa-apa bayaran balik kepadanya berhubung apa-apa jumlah beliau telah belanjakan terhadap pembelian kereta tersebut. Bagaimanapun, di akhir kes bagi pihak pendakwaan, mahkamah sesyen telah melepas dan membebaskan tertuduh tanpa memanggil untuk pembelaannya. Hakim perbicaraan berpendapat bahawa keterangan SP9 adalah bercanggah, dan bahawa wang yang didahulukan melalui tujuh cek tersebut hanyalah pinjaman oleh SP9 kepada tertuduh. Hakim perbicaraan oleh itu berpendapat bahawa pihak pendakwaan tidak membuktikan tertuduh telah menerima barang berharga tanpa balasan. Meskipun terdapat sepuluh saksi bagi pihak pendakwaan yang memberi keterangan dan nota prosiding dan ekshibit dokumentar setebal 127 muka surat, alasan-alasan untuk keputusan hakim perbicaraan mengandungi khususnya penerbitan semula ketujuh-tujuh pertuduhan diikuti dengan tidak muka surat bertaip 'double-spaced'. Pihak pendakwaan telah merayu dengan menegaskan, antara lain bahawa: (a) hakim perbicaraan telah gagal untuk mengenalpasti percanggahan dalam keterangan SP9; (b) hakim perbicaraan telah terkhilaf dalam penemuan bahawa SP9 telah ditakut-takutkan dan oleh itu keterangannya diragui; (c) meskipun terdapat penemuan hakim perbicaraan bahawa wang tersebut merupakan pinjaman oleh SP9 kepada tertuduh, ianya adalah

barangan berharga tanpa balasan bagi tujuan s 165; dan (d) hakim perbicaraan terkhilaf dalam penemuan bahawa perlu ada pembuktian 'gratification'.

Diputuskan, membenarkan rayuan pihak pendakwaan:

(1) Bagi tujuan mahkamah perbicaraan menentukan sama ada pihak pendakwaan telah membuat satu kes prima facie, hakim perbicaraan hendaklah meletakkan keterangan pihak pendakwaan dalam penilaian maksimum. Ini menghendaki hakim perbicaraan memberikan 'reasoned or speaking judgment'. Dalam kes semasa, setelah penelitian terhadap alasan-alasan keputusan mahkamah perbicaraan, adalah jelas bahawa rujukan am hakim perbicaraan tentang percanggahan dalam keterangan pengadu bukan akibat daripada meletakkan keterangan pihak pendakwaan untuk penilaian maksimum, mahupun ia disokong oleh keadaan bercanggah atau alasan spesifik tertentu di mana percanggahan sedemikian ditemui. Di sini, alasan-alasan keputusan tersebut bukanlah 'reasoned or speaking judgment' (lihat perenggan 11–12, 15).

(2) Keterangan SP9 telah dipertimbangkan keseluruhannya dan bukan secara berasingan. Jika dilihat terdapat percanggahan atau penyangkalan berhubung pinjaman tersebut dan/atau bayaran balik itu, percanggahan atau penyangkalan itu telah dijelaskan secara ringkas lagi padat di bawah pemeriksaan semula. Kebenarannya adalah bahawa pembayaran-pembayaran seperti yang dinyatakan dalam pertuduhan-pertuduhan tersebut bukanlah pinjaman dan tertuduh tidak langsung membuat apa-apa bayaran balik (lihat perenggan 36).

(3) Jika hakim perbicaraan meletakkan keterangan pihak pendakwaan untuk penilaian maksimum, tiada keraguan bahawa percanggahan atau penyangkalan tersebut, jika ada, akan dikenalpasti. Tiada apa-apa dinyatakan dalam alasan-alasan keputusan. Justeru itu, hakim perbicaraan telah terkhilaf apabila tiba kepada kesimpulan am bahawa 'the complainant's evidence is always contradictory' (lihat perenggan 39).

(4) Setelah menimbangkan keterangan SP9 secara keseluruhannya, keterangan dan keadaan semasa penilaian itu tidak menyokong penemuan saksi yang ditakut-takutkan. Namun, jikapun terdapat ugutan atau pemaksaan, SP9 telahpun memberikan penjelasan yang memuaskan untuknya dalam keterangan beliau. Hakim perbicaraan, setelah gagal untuk meletakkan keterangan pihak pendakwaan untuk penilaian maksimum, telah terkhilaf dalam menolak keseluruhan keterangan SP9 (lihat perenggan 54).

(5) Pemuasan bukanlah ingredien penting di bawah s 165 Kanun Keseksaan. Penemuan hakim perbicaraan atas dasar 'gratification' dan bukan 'without consideration' dalam kes ini adalah salah di sisi undang-undang. Perkataan 'consideration' tidak ditafsirkan dalam Kanun Keseksaan. Rujukan oleh itu boleh dibuat dalam maksud biasa, semula jadi, popular seperti yang didapati dalam kamus. Dalam bahasa undang-undang, balasan adalah suatu yang bernilai diterima oleh penjanji daripada suatu janji. Ia adalah suatu yang diberi, dijanjikan atau diperoleh oleh satu pihak untuk janji atau

akujanji pihak satu lagi. Dalam kes ini, bayaran dibuat oleh SP9 tanpa apa-apa balasan daripada tertuduh, dan berada dalam skop s 165 (lihat perenggan 58–60).

(6) Dalam kes semasa, keterangan SP9 telah disokong dalam butiran penting oleh keterangan saksi-saksi lain (SP3–SP7). Keterangan mereka boleh dipercayai, berasingan dan berkaitan fakta-fakta yang merupakan paksi pertikaian (lihat perenggan 68).

(7) Dalam kes semasa, keterangan pihak pendakwaan telah membuktikan bahawa tertuduh telah menerima daripada SP9 barangan bernilai melalui bayaran pelbagai jumlah yang digambarkan dalam tujuh cek tersebut. Justeru itu, s 42(3) Akta Pencegahan Rasuah 1997, tertuduh dianggap telah berbuat demikian dengan pengetahuan tentang keadaan yang terbentuk dalam pertuduhan-pertuduhan tersebut, di mana ketujuh-tujuh cek tersebut diterima oleh tertuduh daripada SP9 yang mengetahui tertuduh mengetahui terdapat kaitan dengan fungsi rasminya (tertuduh) sebagai pembantu teknikal, kecuali sebaliknya dibuktikan oleh tertuduh. Hakim perbicaraan telah terkhilaf dalam penemuan bahawa tiada kes prima facie telah dibuktikan oleh pihak pendakwaan dan dalam membebaskan tertuduh tanpa memanggil untuk pembelaan (lihat perenggan 69–70).]

Notes

For cases on grounds of judgment, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2086–2089.

For cases on Penal Code s 165, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1314–1317.

For cases on prosecution's case, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2807–2808.

Cases referred to

Augustine v PP [1964] MLJ 7 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Balasingham v PP [1959] MLJ 193 (refd)
Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689 (refd)
Fairus Nizam bin Shueb v PP [2001] 5 MLJ 224 (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577 (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321 (refd)
Khoon Chye Hin v PP [1961] 27 MLJ 105 (refd)
Lim Guan Eng v PP and other appeals [1998] 3 CLJ 769 (refd)
Looi Kow Chai & Anor v Pendakwa Raya [2003] 2 MLJ 65 (refd)
Mohamed Yusof bin Haji Ahmad v PP [1983] 2 MLJ 167 (refd)
Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor [2000] 7 MLJ 24 (refd)
Murugiah v PP [1941] MLJ 17 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Saimin & Ors. [1971] 2 MLJ 16 (refd)
Pendakwa Raya v Ismail bin Md Russ [2000] ILNS 124 (refd)
Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
Roy S Selvarajah v PP [1998] 3 SLR 517 (refd)
Sabarudin Non v PP and other appeals [2005] 1 CLJ 466 (refd)

Teoh Hoe Chye v PP [1987] 1 MLJ 220 (refd)
Transport Ministry v Garry [1973] 1 NZLR 130 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 2, 42(3)
Criminal Procedure Code ss 107(i), 261, 303A, 307(iii)
Dangerous Drugs Act 1952 s 37A
Immigration Act [Sing]
Penal Code s 165

Anthony Kevin Morais (Deputy Public Prosecutor, Legal and Prosecution Division) for the appellant.
Christopher Fernando (Aris Rizal Christopher Fernando & Co) for the respondent.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the prosecution against the decision of the learned sessions court judge ('the trial judge') who had on 5 June 2003 acquitted and discharged the accused of all the seven amended charges preferred under s 165 of the Penal Code ('the charges') against the respondent-accused ('the accused') without calling for his defence.

[2] For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Penal Code, unless otherwise stated or the context otherwise requires.

CHARGES

[3] The accused is a public servant, to wit, a technical assistant, of the Government of Malaysia and is attached to the Public Works Department ('PWD') Quarry Centre, Gemencheh, Tampin, Negeri Sembilan. In the charges, he was alleged to have accepted, without consideration from one Salehuddin bin Jaapar the Managing Director of Syarikat Masa Damai Sdn Bhd ('Salehuddin'), valuable things which had connection with the accused's official functions. The other particulars contained in the charges are enumerated and tabulated as follows:

	Date and Place	Valuable Thing
1	In the month of March 1997 between 8am and 5pm in Federal Auto Cars Sdn Bhd at No. 15 Jalan Malim, in the district of Melaka Tengah in the state of Melaka	Bank Bumiputra Malaysia cheque No 010258 for RM24,000 being advance towards payment for the car bearing registration No MW 9504

2	On 27 March 1997 between 9am and 4.30pm in Affin Finance Bhd at No 118, Taman Melaka Raya, in the district of Melaka Tengah in the state of Melaka	Malayan Banking Bhd cheque No 907837 for RM884 being instalment payment for the month of May 1997 for the said car
3	On 16 July 1997 between 9am and 4.30pm in the said company and at the said address	Malayan Banking Bhd cheque No 910642 for RM884 being instalment payment for the month of June 1997 for the said car
4	On 21July 1997 between 9am and 4.30pm in the said company and at the said address	Malayan Banking Bhd cheque No 931779 for RM884 being instalment payment for the month of July 1997 for the said car
5	On 30 August 1997 between 9am and 12.30pm in the said company and at the said address	Malayan Banking Bhd cheque No 936626 for RM884 being instalment payment for the month of August 1997 for the said car
6	On 20 October 1997 between 9am and 4.30pm in the said company and at the said address	Malayan Banking Bhd cheque No 976470 for RM1768 being instalment payments for the months of September and October 1997 for the said car
7	On 8 January 1998 between 9am and 4.30pm in the said company and at the said address	Malayan Banking Bhd cheque No 978181 for RM1768 being instalment payments for months of November and December 1997 for the said car

ESSENTIAL INGREDIENTS

[4] In order to establish a prima facie case for each of the charges, the prosecution must prove the following essential ingredients:

(i) that the accused is a public servant; and

(ii) that he has accepted a valuable thing without consideration.

[5] Once the above two essential ingredients have been established by the prosecution, under s 165 which is a prescribed offence under s 2 of the Anti-Corruption Act 1997, the presumption under s 42(3) of the 1997 Act would arise. Section 42(3) reads:

> Where in any proceedings against any person for an offence under s 165 of the Penal Code, it is proved that such person has accepted any valuable thing without consideration such person shall be presumed to have done so with such knowledge as to the circumstances set out in the particulars of the offence, unless the contrary is proved.

[6] In other words, the presumption is that the valuable thing has been accepted by the accused from Salehuddin whom the accused knows to have connection with the official functions of the accused.

PUBLIC SERVANT

[7] There is no dispute that the accused was at the material time a public servant in the capacity as stated in the charges.

TRIAL JUDGE'S OTHER FINDING

[8] The other finding of the the trial judge reads:

> saksi pendakwa SP9 adalah merupakan pengadu di dalam kes ini. Keterangan pengadu sentiasa bercanggah dan dari keterangannya nyata beliau telah diajar dan disuruh untuk membuat laporan dan keseluruhan keterangannya bukanlah merupakan satu keterangan yang diberi dengan sukarela. Perkataan-perkataan yang telah digunakan olehnya seperti perkataan Miugut', 'dipaksa' telah menimbulkan kesangsian mahkamah terhadap keterangannya secara keseluruhan.
>
> Oleh itu keterangan yang mengatakan pembayaran yang dibuat untuk ansuran bulanan kereta Tertuduh bukan merupakan pinjaman adalah diragukan.

[My translation:

> Prosecution witness SP9 is the complainant in this case. Complainant's evidence is always contradictory and from his evidence it is clear that he has been coached and asked to make a report and his entire evidence is not evidence that has been given voluntarily. Words used by him such as 'intimidated', 'compelled' have raised the doubt of the court relating to the whole of his evidence.
>
> Hence evidence stating that payments made towards monthly instalments for the accused's car were not by way of loan was doubtful.]

[9] The trial judge then held that the prosecution had not established that the accused had accepted a valuable thing without consideration.

CONTRADICTIONS AND SPEAKING JUDGMENT

[10] Learned deputy public prosecutor ('the DPP') Mr Anthony Kevin Morais contended that the trial judge, in finding that SP9's evidence was always contradictory, has failed to identify what the contradiction or contradictions were or the grounds for arriving at such contradictions. He cited *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; and *Fairus Nizam bin Shueb v Public Prosecutor* [2001] 5 MLJ 224.

[11] Learned defence counsel Mr Christopher Fernando responded that the trial judge has handed down a 'reasoned or speaking judgment'.

[12] In this regard, I find it instructive to refer to the judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Looi Kow Chai & Anor v Pendakwa Raya*

[2003] 2 MLJ 65 wherein it was clarified that the duty of a trial judge is to determine at the close of the prosecution's case as a trier of fact whether the prosecution has made out a prima facie case and that the trial judge must subject the prosecution evidence to maximum evaluation. This principle was affirmed by the Federal Court in a judgment delivered by the same learned judge in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 at p 210 para 7 (see also *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 per Augustine Paul JCA (now FCJ) delivering the judgment for the Federal Court).

[13] In my view, this principle of maximum evaluation would require a trial judge to give a 'reasoned or speaking judgment'.

[14] The grounds of decision of the trial judge consist of a reproduction of the seven charges, followed by three type-written double spacing pages as the substantive part thereof. A total of 10 prosecution witnesses testified. The notes of proceedings together with the documentary exhibits are contained in 127 pages of the 155-page appeal record.

[15] Upon a proper perusal of the said grounds, it is abundantly clear to me that the trial judge's general reference to contradiction(s) in the complainant's evidence was not the result of subjecting the prosecution evidence to maximum evaluation nor was it supported by specific instances of such contradiction(s) or the specific grounds on which such contradiction(s) had been arrived at. With the utmost respect, the grounds of decision had fallen short of a 'reasoned or speaking judgment'.

[16] In *Ganapathy*, the trial judge's grounds of judgment reproduced substantially the witness' testimonies in the form of questions and answers, but failed to analyse or assess those testimonies. On appeal to the Federal Court, Shaik Daud JCA (as he then was) delivering the majority judgment for the Federal Court adverted to the importance of delivering the grounds of judgment so as to convey a 'speaking judgment'.

[17] In *Balasingham v Public Prosecutor* [1959] MLJ 193 (HC), one of the grounds of appeal was that the sessions court president gave no reasons for his findings. In allowing the appeal, Ismail Khan J (later CJ (Borneo)) held that:

> An appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate court are entitled to know the reasons for the finding. The trial court is under a statutory duty under s 308 of the Criminal Procedure Code (Cap 6) to transmit to the appellate court the grounds of decision which convey a reasoned judgment on the facts and the law not merely the conclusion arrived at. The absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the probabilities of the case may not have influenced the mental process of the trial judge in arriving at the ultimate finding.

[18] In *Murugiah v Public Prosecutor* [1941] MLJ 17 (HC), Home J held that except in the simplest of cases, a magistrate in giving his grounds of decision under

s 307(iii) of the Criminal Procedure Code (Cap 6) (for purposes of appeals to the High Court) should state the reasons why he believed or disbelieved the evidence given on behalf of, eg the prosecution.

[19] A similar sentiment was expressed in *Augustine v Public Prosecutor* [1964] MLJ 7 by Ong J who emphasised that except in the most straightforward type of cases, where the facts clearly establish all the necessary ingredients of an offence, it is the duty of the magistrate to state at least what his findings of fact were.

[20] I would add that under s 303A of the CPC, a reference to a magistrate shall be deemed to include a reference to a session's court judge.

Murugiah and *Augustine* were followed in *Fairus Nizam* by PS Gill J (later FCJ) who stressed the importance for sessions court judges and magistrates to take heed of these cases and to abide by them, adding that their judgments should be 'speaking judgments' and not just a regurgitation of facts and on abrupt finding. In the absence of a speaking judgment there, his Lordship proceeded to evaluate the evidence on appeal.

MAXIMUM EVALUATION OF EVIDENCE

[21] In line with the above principle enunciated in *Fairus Nizam*, I am of the view that the absence of a reasoned or speaking judgment by the trial judge renders it necessary for me to evaluate the complainant's (SP9's) evidence in order to determine whether the trial judge has erred in the general conclusion that 'the complainant's evidence is always contradictory'.

[22] SP9 was at the material time the managing director of Syarikat Masa Damai Sdn Bhd ('the company') which carried out civil engineering works.

[23] In 1996, the company and PWD executed a contract No JKR/NS/N/IP/23/1996 entitled 'Contract for the Supply and Delivery of Metals' at a consideration of RM3,907,700 for three years from 8 July 1996 to 7 July 1999 at JKR Kuari Pusat (PWD Quarry Centre) Gemencheh Negeri Sembilan ('the works'). SP9 represented the company in the execution of the contract. Monthly payments by PWD for the company's works in the transportation of the metals from the PWD Quarry Centre were to be made upon the issue of indents by PWD pursuant to the company's invoices.

[24] At the material time, the accused was the Gemencheh technical assistant in charge of the PWD Quarry Centre and knew SP9. For purposes of payment, the accused would issue and sign the indents pursuant to the company's invoices.

[25] SP9 testified that in order to handle the works, the accused had, on 30 March 1997, asked SP9 to procure a Volvo car for the accused to buy in April 1997 and the accused needed a sum of RM24,000. SP9 added that the accused was to become the

quarry manager with full powers over the PWD Quarry Centre, and that if SP9 failed to procure the Volvo car, the company's transportation of the metals from the PWD Quarry Centre would be interrupted.

[26] Although the money for the Volvo car was not provided for in the contract, SP9 at the request of the accused effected payment of the sum of RM24,000 by way of Bank Bumiputra cheque No 010258 (exh P3). SP9 borrowed that cheque from his friend, one Tuan Hj Salman Rusdi, and that sum was paid as the advance for the Volvo car bearing registration No MW 9504 ('the car') which, the accused told SP9, had a good engine. SP9 has subsequently repaid the said sum of RM24,000 to his said friend.

[27] SP9 also testified that at the further request of the accused, SP9 paid the monthly instalments for the car by way of six other cheques viz:

(i) exh P5: Malayan Banking Berhad cheque No 907837 for RM884;

(ii) exh P6: Malayan Banking Berhad cheque No 910642 for RM884;

(iii) exh P7: Malayan Banking Berhad cheque No 931779 for RM884;

(iv) exh P9: Malayan Banking Berhad cheque No 936626 for RM884;

(v) exh P10: Malayan Banking Berhad cheque No 976470 for RM1,782.47;

(vi) exh P23: SP9's letter enclosing Malayan Banking Berhad cheque No 978181 for RM1,768.00.

[28] SP9 was requested by an Anti Corruption Agency ('ACA') Officer one Encik Jalil Kasam to lodge a complaint by way of a report which SP9 signed.

[29] Defence cross-examination of SP9 did not cover the seven cheques which were payments effected by SP9 towards the deposit of RM24,000 and all the instalments for the car which constituted the subject matter of each of the charges. Hence, I hold that the defence has accepted the testimony of SP9 relating to those payments.

[30] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213 right column C-F Raja Azlan Shah CJ (Malaya) (now HRH Sultan of Perak) held, inter alia, that:

> ... Failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony. On this point, we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony.

[31] The eminent learned Chief Justice also referred to the exceptions stated in the judgment of the Supreme Court of New Zealand in *Transport Ministry v Garry* [1973] 1 NZLR 130, p 122 but those exceptions do not appear to have any application here. See also *Pendakwa Raya v Ismail bin Md Russ* [2000] ILNS 124.

[32] Under cross-examination, SP9 confirmed that the accused did not make any repayment to him of the sums stated in the charges.

[33] Although SP9 admitted that his letters dated 14 January 2004 and 19 January 2004 to the ACA stated that the accused had repaid all the money, SP9 clarified under cross-examination that what he had written to the ACA was not true and that the accused had not repaid these sums to SP9.

[34] In re-examination, SP9 explained that as an expression of sympathy, he wrote the two letters to the ACA after the accused had pleaded with him, and that both SP9 and the accused agreed that the accused has not repaid the money to SP9 who added that what he testified in court is the truth.

[35] In my judgment, SP9's evidence must be considered in its entirety and not in isolation. While there may be discrepancy or contradiction pertaining to the so-called loan and/or the repayment thereof, the discrepancy or contradiction has been concisely clarified and explicitly explained under re-examination and the truth is that the payments as stated in the charges were not loans nor had the accused effected any repayment at all.

[36] The object of re-examination is to give an opportunity to reconcile discrepancies, if any, between statements, in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination (see *Sarkar on Evidence* Vol 2 pp 2193–2194, as referred to by VT Singham JC (now J) in *Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor* [2000] 7 MLJ 24, pp 415–416).

[37] Had there been such a loan and/or repayment, it would have been reasonable to expect the defence to put to SP9 the specific particulars of such a loan and/or repayment thereof so as to demolish SP9's evidence. The trial judge's notes of evidence showed no such specific particulars whatsoever.

[38] In my judgment, had the trial judge subjected the prosecution's evidence to maximum evaluation, there would have been no doubt that the discrepency or contradiction, if any, would have been identified, but none was stated in the grounds of decision. Hence, the trial judge has erred in arriving at the general conclusion that 'the complainant's evidence is always contradictory'.

WITNESS INTIMIDATION

[39] The learned DPP took the position that the trial judge has erred in finding that SP9 has been intimidated to testify at the trial and so his entire evidence was doubtful. He added that the trial judge ought to have excluded only the inadmissible evidence, citing *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689 (CA); *Khoon Chye Hin v Public Prosecutor* [1961] 27 MLJ 105 (CA); and *Roy S Selvarajah v Public Prosecutor* [1998] 3 SLR 517.

[40] The defence contention is that since SP9 has been intimidated, tortured and subjected to a shocking brain-washing exercise, it is possible to distinguish *Roy S Selvarajah*. The defence cited:

(i) *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321 (SC);

(ii) *Mohamed Yusof bin Haji Ahmad v Public Prosecutor* [1983] 2 MLJ 167;

(iii) *Public Prosecutor v Saimin & Ors.* [1971] 2 MLJ 16 (HC); and

(iv) *Teoh Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220 (SC).

[41] I am of the view that the correct approach has been set out by the Court of Appeal in *Che Omar bin Mohd Akhir*. In that case, defence counsel submitted that there were conradictions or discrepancies in the evidence of prosecution witnesses. Haidar JCA (later CJ (Malaya)) held that it would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. The Court of Appeal followed the judgment of Thomson CJ in *Khoon Chye Hin* at p 107 as follows:

> ... If a witness demonstrably tells lies on one or two points, then it is clear that he is not & reliable witness, and, as a matter of prudence, the rest of the evidence must be scrutinized with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence must in law be rejected' is to go too far and is wrong

[42] In order to appreciate the merits of these conflicting submissions, it is imperative for me to again subject the relevant evidence of SP9 to maximum evaluation.

[43] First, although SP9's report was reduced to writing by an ACA officer, it was signed by SP9, who understood the contents thereof. SP9 holds a diploma in civil engineering. SP9 added that the content of the report had been explained (diterangkan) by ACA officers to him and he understood it. In my view, there is nothing irregular in this procedure. Indeed, it is consistent with s 107(i) of the Criminal Procedure Code which reads:

> 107 Information
>
> (i) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.

[44] Next, cross examination of SP9 revealed that ACA officers had raided SP9's office, repeatedly requested for SP9's cooperation to record his statements, to collect a subpoena from the ACA and to answer questions in court.

[45] However, under re-examination, SP9 confirmed that the word 'ugutan' (intimidation) was used by learned defence counsel. SP9 added that he was in the ACA office for some five hours but in connection with other cases, and not this case.

A **[46]** I shall now consider the authorities cited by the defence.

[47] The relevant issue in *Hasibullah* concerns the admissibility of a confession under s 37A of the Dangerous Drugs Act 1952. The confession was found to be based on suspicion and guess work. The Supreme Court speaking through Edgar **B** Joseph Jr SCJ (as he then was) held that the confession was not admissible on the ground, inter alia, that it was not voluntarily made.

[48] Where eg threat has been proved, it would render the accused's cautioned statement inadmissible: *Mohamed Yusof* per Syed Agil Barakbah J (later SCJ).

C

[49] In Saimin, the magistrate called for the accused's defence not because the magistrate was satisfied with the case of the prosecution but because he wanted the accused to explain. Sharma J (as he then was) held at p 17B left, inter alia, that the magistrate had failed to apply and totally ignored the very elementary principles which a court of criminal justice must strictly adhere to.

D

[50] In *Teoh Hoe Chye*, the fundamental issue raised before Mohamed Dzaiddin J (later Chief Justice Malaysia) was whether the failure to call a particular witness had given rise to a serious gap in the prosecution's case.

E **[51]** My analysis of the defence authorities above leads me to the conclusion that do not revolve around the issue of witness intimidation and so are not of any assistance to the defence contention herein.

[52] On the issue of witness intimidation, I am mindful of the principle **F** enunciated in *Roy S Selvarajah*, where the particular prosecution witness (PW12) testified that the prosecutor had told him that if he did not admit having seen the passport of an overstayer under the Singapore Immigration Act, he would not be let off until the prosecutor got to the bottom of the case. PW12 testified in court that in fact he had not seen the passport. On appeal, it was argued that PW12's evidence should be disregarded because he had allegedly admitted that he was intimidated by **G** the prosecutor. Yong Pung How CJ (Singapore) held that:

> Witness intimidation is a very serious allegation, and the statement hardly supports an admission of PW12 that he had changed his evidence because he was intimidated. There is bound to be a level of tension when a witness is being questioned by a law enforcement officer in the course of his investigations and this is nothing more than an attempt to get **H** PW12 to co-operate with the investigation. Telling a witness during investigation that he should tell the truth, without more, cannot possibly amount to witness intimidation.

[53] After considering SPQ's evidence in its entirety, I am of the view that the **I** evidence and prevailing circumstances as evaluated above do not support a finding of witness intimidation. However, even if there was such an intimidation or compulsion, satisfactory explanation has been given by SP9 in his evidence. The trial

judge, having failed to subject the prosecution evidence to maximum evaluation, has wrongly rejected the whole of SP9's evidence.

WITHOUT CONSIDERATION

[54] The prosecution argued that even going by the trial judge's finding that the seven cheques, by which payments were effected, were loans by SP9 to the accused, they are nonetheless valuable things without consideration for the purposes of s 165, adding that the trial judge had erred in finding that there must be 'suapan' (or 'gratification'). Support was sought in *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561.

[55] The defence contended that the accused had given adequate and equal consideration for the seven cheques.

[56] Upon a proper perusal of the trial judge's grounds at p 61 of the appeal record, it is to be noted that the trial judge held as follows:

> ... adalah tidak mencukupi hanya menerangkan bahawa pembayaran ansuran tersebut dibuatnya adalah merupakan satu suapan oleh Tertuduh.

[My translation:

> (It is not sufficient to only explain that the instalment payments were made as a gratification by the accused.)

[57] In my view, gratification is not an essential ingredient under s 165. The trial judge's finding on the basis of 'gratification' instead of 'without consideration' is an error in law.

[58] As the word 'consideration' has not been defined in the Penal Code, reference may be made to its ordinary, natural, popular meaning as found in a dictionary. In ordinary parlance, a consideration is something of value (such as an act, a forebearence, or a return promise) received by a promisor from a promisee (*Black's Law Dictionary*). It is anything given, promised or foreborne by one party in exchange for the promise or undertaking of another (*The Concise Oxford Dictionary*).

[59] Even on the basis of a loan, it is imperative to note that SP9's payments of the seven cheques in favour of the accused have not been reciprocated with or by any corresponding return in exchange or repayment thereof emanating from the accused. Clearly, the payments were made by SP9 without any consideration from the accused, and is within the ambit of s 165.

ACCOMPLICE

[60] The defence contended that SP9 is an accomplice whose evidence requires corroboration, and since he is not a credible witness, no amount of corroboration can save his evidence.

[61] The prosecution argued that the evidence of SP9 has been corroborated by the evidence of SP3, SP4, SP5, SP6, SP7 and also by the payments of the seven cheques in favour of the accused. Reference was made, inter alia, to *Sabarudin Non v Public Prosecutor and other appeals* [2005] 1 CLJ 466, p 475.

[62] In my judgment, it is to be noted that the issue of accomplice and hence corroboration had not been raised at the trial, as a result of which the trial judge did not have the opportunity of considering it.

[63] At this juncture, I shall refer to the judgment of the Court of Appeal in *Sabarudin Non* which in turn referred to *Lim Guan Eng v Public Prosecutor and other appeals* [1998] 3 CLJ 769 in relation to the judicial appreciation of an accomplice for which there is a special rule for the guidance of the court.

[64] In Sabarudin Non, supra, at p 474e, Gopal Sri Ram JCA observed that the evidence of an accomplice must be both credible and be corroborated and that the first element of credibility must be met by all witnesses while the second element of corroboration is peculiar to an accomplice, adding that once an accomplice is found by a trial court to be an unreliable witness, then his evidence must be rejected and no question of corroboration can arise. His Lordship then set out the principles governing evidence that requires corroboration whether as a matter of practice or as a matter of written law, of which I shall only refer to the relevant principle (4) as follows:

(i) ...

(ii) ...

(iii) ...

(iv) To constitute true corroboration in the eyes of the law, the corroborative evidence must:

(a) be capable of belief;

(b) be independent...;

(c) be in respect of the fact or facts that lie at the axis of the dispute, that is to say, upon the fact in issue and not upon some collateral matter or upon a fact in respect of which there is no quarrel. In other words, it must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.

[65] Again, upon a maximum evaluation of the evidence adduced by the prosecution, it is clear that SP9 is a credible witness in material particulars which are capable of being corroborated by other independent witnesses whose evidence may now be examined and evaluated. SP3, the sales consultant of Federal Auto, was in his showroom in Federal Auto, Jalan Malim, Melaka in March 1997 when the accused walked in and expressed his desire to buy the car from SP3. The down payment was RM24,000, with subsequent monthly instalments of RM884.

[66] SP4, SP5 and SP6 and SP7 were bank officers who testified that payments on all the seven cheques have been effected and cleared for the monthly instalments for the car.

[67] On the evidence, I find that SP9's evidence has been corroborated in material particulars by the evidence of SP3 to SP7 and that their evidence is capable of belief, independent and in respect of facts that lie at the axis of the dispute.

PRIMA FACIE CASE

[68] In my view, the prosecution evidence has established that the accused has accepted from Salehuddin valuable things by way of payment of the various sums reflected in the seven cheques. Hence, under s 42(3) of the 1997 Act, the accused shall be presumed to have done so with such knowledge as to the circumstances set out in the charges viz that the seven cheques have been accepted by the accused from Salehuddin who the accused knows has connection with the official functions of the accused as a technical assistant, unless the contrary is proved by the accused.

[69] I hold that the trial judge has erred in finding that no prima facie case has been established by the prosecution and in acquitting the accused without calling for the defence.

CONCLUSION

[70] On the foregoing grounds, I allow this appeal, set aside the order of acquittal and discharge, substitute it with the finding that the prosecution has established a prima facie case for the accused to answer, and order that the accused be called upon to enter on his defence.

[71] I remit this case to sessions court 1 for mention today and for continued trial on the defence only. As the trial judge is presently not performing judicial duties, I direct that the trial be continued before the succeeding sessions court judge under s 261 of the Criminal Procedure Code. The accused's bail is extended.

Prosecution's appeal allowed.

Reported by John Paul Simon